IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LPA No. 275 of 1997 in SCA No 249 of 1995
with
LPA No. 277 of 1997 in SCA No 179 of 1995
with
LPA No. 279 of 1997 in SCA No 737 of 1995
with
LPA No. 281 of 1997 in SCA No 5018 of 1990
with
LPA No. 282 of 1997 in SCA No 5019 of 1990
with
LPA No.284 to 288 of 1997 in SCA 8216 of 1995
with
LPA 290 to 293 of 1997 in SCA 5022 of 1990
with
LPA 295 to 298 of 1997 in SCA 7744 of 1991
with
LPA No. 300 of 1997 in SCA No.5053 of 1990
with
LPA No.301 of 1997 in SCA No.5054 of 1990
with
LPA No.304 to 347 of 1997 in SCA No.5055 of 1990
with
LPA No.362 of 1998 in SCA No.6996 of 1995

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ABAD DAIRY

Versus

MANJIBHAI DHANJIBHAI

Appearance:

Mr.K.M.Patel for MR DEEPAK V PATEL for Appellant in all matters

MR KR KOSHTI for Respondent No. 1 in all matters except Mr.Mukul Sinha, for respondent in LPA 295/97.

Mr.Shalin Mehta for Girish Patel for respondent in LPA 362/1998.

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI

and

MR.JUSTICE J.M.PANCHAL

Date of decision: 25/07/2000

CAV JUDGEMENT (Per D.M.Dharamadhikari, CJ)

These Letters Patents Appeals have been preferred by Abad Dairy which is a unit of Gujarat Dairy Development Corporation limited, and is an `employer' within the meaning of the Industrial Disputes Act, 1947. The employer feels aggrieved by a common oral judgement pronounced on 23.4.96, 1.5.96, 21.6.96, 3.8.96 and 5.8.96 by Learned Single Judge (M.R.Calla, J). The employer also feels aggrieved by the judgement dated 22.1.1998 passed by the Learned Single Judge (Rajesh Balia, J) in some of the cognate matters, which are being decided by this common judgement.

2. The common question involved in all these appeals is whether the Badli workmen employed in Abad Dairy, after it was taken over from the Ahmedabad Municipal Corporation by the present employer i.e. Gujarat Dairy Development Corporation, are entitled to the relief of regularisation of their service and payment of consequential monetary benefits on their completion of 900 days of work in last period of 5 years in terms of tripartite settlement dated 11.5.81 and circulars dated 29.12.78, 2.6.83 and 16.8.84 alleged to have been issued thereunder. Learned Single Judge (Rajesh Balia, J) by the judgement impugned dated 22.1.98 upheld the award of the Industrial Tribunal, Ahmedabad in favour of the Badli workmen and rejected the writ petitions filed by the employer in case of some of the workmen.

3. Learned Single Judge (M.R.Calla, J) by the impugned judgement pronounced on various dates mentioned above allowed the Badli workers' claim for regularisation and payment of monetary benefits on the petitions jointly

filed by them, individually and through the Union.

4. The operative part of the impugned judgement of Justice M.R.Calla granting relief of regularisation and monetary benefits to Badli workers of the Abad Dairy reads as under:-

> "The result of the aforesaid discussion is that all these petitions succeed and it is directed that all the petitioners who have completed 900 days in accordance with the policy decision No. 334 dated 29.12.1998 read with settlement under section 2(p) and the circulars dated 2.6.1983 and 16.8.1984 may be granted the relief of regularisation from due date with all consequential benefits, if any, and thereafter it will be open for the Corporation to deal with such employees in accordance with law on account of subsequent developments and the fate they should have met otherwise as regular employees for all purposes including retrenchment keeping in view the observations made in the judgement. Appropriate orders may be issued accordingly within a period of three months from the date the certified copy of this order is served. Rule is made absolute in all these petitions accordingly with no order as to costs."

5. The facts leading to the raising of the aforesaid industrial disputes by the Badli workmen of Abad Dairy need be stated in brief.

6. The Abad dairy was run by the Ahmedabad Municipal Corporation upto the year 1971. It was taken over on 20.12.79 by Gujarat Dairy Development Corporation (the employer herein). At the time of taking over by the Corporation, the question arose regarding the service conditions and other facilities of the employees of erstwhile Municipal Corporation who became employees of the present employer. A triparte settlement in terms of Section 2(P) of Industrial Disputes Act was arrived at on 11.5.1981 between the Management of the Dairy and the Workers Union. One of the terms of the settlement on which heavy reliance has been placed on behalf of the workers is that in future salaries and other facilities to the employees working in the dairy shall be kept equivalent to pay scales and facilities made available to the employees of the Ahmedabad Municipal Corporation.

7. The case of the workmen is that it was agreed that the service conditions of the employees of the dairy

would be similar to service conditions of employees in the Ahmedabad Municipal Corporation. Pursuant to the settlement, policy decisions were taken from time to time by issuing various circulars. No. 334 dated 29.12.78 and other circulars dated 2.6.83 and 16.8.1984. By the aforesaid policy decisions daily wage employees of Municipal Corporation on completion of 900 days in 5 years period were entitled to be regularised. The case of workmen in these petitions giving rise to these appeals is that although they are all Badli workers they are infact daily rated employees. Under the settlement and the policy decisions and circulars issued thereunder on completion of 900 days of service in past 5 years, they were entitled to be regularised at par with the employees of the Ahmedabad Municipal Corporation. Some of the workmen approached the Industrial Court and obtained the relief of regularisation and the others individually or through the Union have approached this Court by these writ petitions.

8. The employer resisted the claim of the workmen by raising a preliminary objection that the Industrial Dispute raised claiming relief of regularisation cannot be adjudicated upon in writ proceedings. The appropriate remedy of the workmen was to approach the appropriate Industrial Court by raising a dispute under the provisions of the Industrial Disputes Act.

9. On merits the claim of the workmen was resisted mainly on grounds interalia that due to adverse market conditions and competition in dairy business, the respondent's dairy had been financially crippled. It has been continuously incurring the losses year after year. As a result of heavy financial losses, by order made on 26.10.94 under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 in account of accumulation of financial losses equal to or exceeding its entire networth, the unit has been declared as a `sick industry'.

10. It is also stated that there is already a surplus permanent staff which is required to be retrenched and infact the employer has introduced a voluntary retirement scheme which has been availed of by about 671 workmen. It is submitted that since the business of the employer has considerably dwindled, it has no work for the workmen such as to grant them regularisation. It is also submitted that Badli workmen do not fall in the category of daily rated employees and are not covered by triparte settlement which is binding only on the parties to the settlement. The present employees joined to serve in the

dairy as Badli workmen much after the settlement and have no legal right to claim regularisation. The employer also disputed the fact that the workmen before this court have completed requisite 900 days of work in a period of 5 years to claim benefit of regularisation. Lastly on behalf of the employer, it is submitted that there is no justification for claiming monetary benefits by way of back wages from due date of regularisation as the industry being sick is unable to bear such financial burden.

11. We have heard the arguments advanced by Shri Kanubhai Patel on behalf of the employer and Shri Mukul Sinha on behalf of the workmen. Before dealing with the various contentions advanced by the parties and the reasons recorded by the Learned Single Judge for granting relief to the workmen, it is necessary to examine the legal provisions for finding out the justification of the claim of the workmen. Badli workman is not separately defined under the Industrial Disputes Act. In Para 10 of the 5th Schedule `unfair labour practises' have been enumerated under Section 2(r)(a) of the Industrial Disputes Act. The description of workmen as `Badlis' is to be found in Para 10 of Vth Schedule under caption `unfair labour practice'. It reads as under:-

> "To employ workmen as "Badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen."

In model Standing Order 3 under Bombay Industrial Employment (Standing Orders) Rules, 1959, framed under the Industrial Employment Standing Orders Act, 1946, the workmen have been classified by different descriptions such as `permanent', `probationer', `badlis' or `substitutes', `temporary casuals' and `apprentice'. Badli worker has been described in Standing Order 3(2)(c) of the Model Standing Orders as under:-

> "3(2(c). `badli' or `substitute' means a workman who is appointed to the post of a permanent workman or probationer, who is temporarily absent and whose name is entered in the badli register."

Daily rated workman in the model standing order may fall in the definition of `temporary' workman. It is defined in clause (d) of said standing order 3(2) as under:-

"3(2)(d). `Temporary workman' means a workman who has been appointed for a limited period for work which is of an essentially temporary nature, or who is employed temporarily as an additional workman in connection with temporary increase in work of a permanent nature."

The position of Badli workmen in the employment has been explained by the Supreme Court in the case of Prakash Cotton Mills Vs. Rashtriya Mills Mazdoor Sangh reported in 1986 SCR (3) Pg. 419. by observing thus:-

"15. .... it is not in disputed that Badli workmen get work only in absence, temporary or otherwise, of regular employees, and that they do not have any guaranteed right of employment. Their names are not borne on the muster rolls of the establishment concerned. Indeed, a Badli workman has no right to claim employment in place of any absentee employee. In any particular case, if there be some jobs to be performed and the employee concerned is absent, the Company may take in a Badli workman for the purpose. Badli workmen are really casual employees without any right to be employed."

From the nature of employment of Badli worker, it is clear that they can claim no equal status or parity in service conditions with temporary workmen/daily rated employes.

12. The Learned Single Judge has recognised the above distinction between the nature of employment of Badli workers and other temporary, permanent or probationers. But his reasoning is that in the settlement and policy decisions taken thereunder by the Corporation, no such distinction between the different categories of workmen has been made. The Learned Single Judge (M.R.Calla, J) therefore holds that all workers including the badli workers are fully covered by the relevant policy decision and the settlement.

13. The above reasoning, with respect, does not commend to us. The settlement was reached at the time of the taking over of unit by the GDD Corporation. The present workmen got employment as Badli workmen after the signing of the settlement. At the time of signing of the

settlement, the Badli workers to be employed in future were not in contemplation of the parties. The settlement was reached for regulating the service conditions of the erstwhile employees in the dairy of Ahmedabad Municipal Corporation whose services were taken over by the Gujarat Dairy Development Corporation.

14. The Learned Counsel appearing on behalf of the Corporation is perfectly right in pointing out that the settlement reached, otherwise than in the course of conciliation, is binding only on the parties to the agreement in accordance with section 18(1) of the Industrial Disputes Act. It is only the settlement which is arrived at in the course of conciliation proceedings which is binding on the workmen in employment at the time of the settlement as also all those who subsequently become employed in that establishment. The said distinction is clearly brought out in Section 18(1) and Section 18(3)(d) of the Industrial Disputes Act which reads as under:-

"18. Persons on whom settlements and awards are binding -

(1) A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement.

(2) ....

(3) A settlement arrived at in the course of conciliation proceedings under this Act [or an arbitration award in a case where a notification has been issued under sub-section (3-A) of Section 10-A] or [an award [of a Labour Court, Tribunal or National Tribunal which has become enforceable] shall be binding on -

(a) ...
(b) ...
(c) ...
(d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment of part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part."

The above distinction with regard to the binding

effect of a settlement has been duly taken note off and given effect to by the Supreme Court in the case of Syndicate Bank Vs. K.Umesh Nayak reported in AIR 1995 SC 319.

15. In reply to the above arguments advanced on behalf of the employer, with the aid of provisions of section 18(1)(3(d), the Learned Counsel appearing for the workman took this Court through the contents of the Gujarati version of the settlement. It is pointed out that the settlement was reached to regulate the service conditions of existing employees working with the previous employer and whose services were transferred to the employer, as also of employees who would get employment in the new employment in the dairy under the new employer. It is also submitted that subsequent policy decision contained in the circular and the orders issued from time to time clearly show that the settlement, policy decisions, circulars and orders were in the nature of laying down condition of service of existing and all future questions. On behalf of the workmen, it is therefore urged that irrespective of non-binding nature of the settlement, which was reached not in the course of conciliation proceedings, all employees - present and future are covered by it. The Badli workers who were employed subsequent to the settlement can, therefore, base their claim for regularisation on the settlement. The above argument did arise for consideration before the Learned Single Judge as it has been advanced in this appeal only in reply to the contention advanced on behalf of the appellant.

16. We have gone through the contents of settlement and the circulars issued thereunder. We have also tried to compare the English and Gujarati version of the same. We do not find any merit in the submission made on behalf of the workman that Badli workmen employed subsequent to the settlement, can be held to have been covered by it. Keeping into consideration the background in which the settlement was reached, it appears to us clear that it was intended to regulate the service conditions of erstwhile employees of the dairy who were serving under the Municipal Corporation at the time of transfer of the Industrial Unit. The erstwhile employees of Municipal Corporation working in the dairy and employees, who came in employment after taking over by the Unit, may be in contemplation for being governed by the terms of the settlement but the settlement, in terms of the Section 18(1) of the Industrial Disputes Act would bind only the parties to the settlement as it was not reached in course of conciliation. The workman cannot wriggle out of this

legal effect of the provisions of Section 18(1) read with Section 18(3)(d) of the Act.

17. Giving a benevolent reading to the settlement and the circulars issued thereunder, we are unable to accept the interpretation placed on them by the Learned Counsel for the workman that the `Badli workers' employed as `substitutes' for regular or daily rated employees were also covered by the terms of the settlement and the policy decision taken from time to time. As we have seen the Industrial Law maintains a distinction between a `permanent' or `temporary' workman and a `Badli worker'. Badli Worker gets employment only when a regular workman is absent or on leave. He gets employment as a substitute. It would be reading more than what is contained in the settlement and the policy decision to infer that the new employer agreed to regularise even such workman who happened to be employed as and when necessary, by the employers as substitutes or Badlis. In our considered opinion therefore, the Learned Single Judge has committed an error in holding that the settlement and policy decisions can constitute just and valid foundation for the workman's claim for regularisation.

18. The Learned Single Judge in granting relief to the workmen also accepted the case set up on behalf of the workman that the employer had been adopting discriminatory attitude and unfair labour practice in giving benefit of settlement by regularisation of some Badli workers and denying such benefit to others. In Para 10 of the Vth Schedule to the Industrial Disputes Act, Badlis and Casuals employed continued as such for years constitutes an unfair labour practice. The relevant part of para 10 of Vth Schedule to the Industrial Disputes Act reads thus:-

> "10. To employ workmen as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen."

19. We have gone through the relevant part of the judgement of the Learned Single Judge. In our opinion there was no evidence or material for the Learned Judge to come to the conclusion that the employer's action was either discriminatory or amounted to unfair labour practice. The question whether the employer meted out discriminatory treatment and/or was adopting unfair labour practice was a question purely one of fact. The

regular forum for adjudication of such disputes is in Industrial Forum, where evidence of employer or workmen could have been recorded. In the absence of evidence, the Learned Single Judge could not have come to the conclusion that the employer adopted discriminatory attitude and resorted to unfair labour practice. On behalf of the employer, it has been explained that without considering and understanding the implications and legal effect of the settlement, a few badli workers might have been regularised, by extending the benefit of the settlement and the policy decision but such regularisations were not validly made. Benefit of the settlement wrongly given to some Badlis in the past, constitute no good grounds for claiming regularisation by others who are not legally entitled to the same. The submission made on behalf of the employer is well supported by the following observations of the Supreme Court in Chandigarh Administration and Another Vs. Jagjitsingh reported in 1995 SC 705. The relevant portion in Para 8 of the said judgement is as under:-

> "Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order."

There are circumstances more than one before this Court for not upholding the impugned orders of the Learned Single Judge in favour of the workmen. Our conclusion therefore is that the triparte settlement does not confer any benefit on the Badli workmen who came to be subsequently employed in the dairy under the present employer. We find that the Learned Judge has failed to consider several important legal and factual aspects including that Badli Workmen were only casuals and employed as substitutes. The unit has been declared `sick' and is now under the Board for Industrial and Financial Reconstruction. It is now governed by the

provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. Because of the steep fall in its business there is no sufficient work with the employer. The unit is under a grinding financial strain and unable to sustain the burden of employment of large number of Badli workmen as regular employes hence wages and monetary benefits from retrospective dates could not have been awarded in their favour. These circumstances, in our considered opinion are very much relevant for which the relief of regularisation and back wages claimed by the workmen in these petitions, should have been refused. The awards of the Tribunal in favour of individual workman impugned in petitions under Article 227, for the same reason, ought not have been upheld by the Learned Single Judge (Rajesh Balia, J). No employer whose unit has been declared sick and is under the Sick Industrial and Financial Reconstruction can be directed to regularise substitute or casuals and pay them back wages.

20. Similar claim of regularisation in various departments of the State was negatived by Lahoti, J (as he then was) as a member of Division Bench of the High Court of Madhya Pradesh in the case of Sureshchandra & Others Vs. State of Madhya Pradesh reported in 1993 LIC 823. The following observations contained in Para 46 and 47 of the judgement justify denial of claim of the Badli workmen for regularisation:-

"46. When there is no job left to be performed and the regular staff is enough to satisfy the regular requirements of the department, forced entry of workers in the department in the name of regularisation, by compelling retention of such workers as were brought in casually to fulfil casual needs of the department is sure to bring inefficiency and demoralisation in the public services for there would be a number of persons being paid without any work being taken from them. Surplus staff is sure to be counter productive in the department spoiling the work culture, also entailing heavily on the public exchequer. No doubt, employees in the public section must have security of tenure and the feeling of safety by permanence in employment but at the same time in the larger interest of society, weighty considerations on the other side cannot just be blinked.

47. Casual and contingency employment such as under scheme do provide employment and earning to the needy, may be for short duration. If service

jurisprudence is so developed as would completely prevent the employer from getting rid of the casual workers in spite of the expiry of the casual work then the employer would be compelled not to provide even casual and temporary employment, a policy trend which has already set in. This would be detrimental to the interest of both, the employers and the employees. Far from contributing to welfare of unemployed it would boomerang at that."

Similar claims of regularisation by the daily rated workers have not been favourably considered by the Supreme Court in case where the employer has no posts or no work. See State of Uttar Pradesh and Others Vs. U.P.Madhyamik Shiksha Parishad Shramik Sangh and Another reported in 1996 SC Vol. VII, 34.

27. The case of Supreme Court decision in Standing Conference of Public Enterprises Vs. New Delhi Mazdoor Union reported in 1995 Supp (1) SCC, 196 was distinguished by the Learned Single Judge (Calla, J) on the ground that sickness of the employer's unit was only an additional ground to negative the claim of the workmen and not the sole ground. Such distinction, as is sought to be made by the Learned Judge, does not support his reasoning that although the employer's unit is sick because of lack of financial resources and its business has substantially dwindled leaving less job opportunities with him, even then it should regularise the badli workers and pay them back wages and other benefits.

28. In the case of Hindustan Steel Works Construction Ltd. Vs. H.S.W.C. Ltd. Employees' Union, Hyderabad reported in AIR 1995 SC 1163, `financial crisis' and `surplus staff' with the employer have been held to be relevant grounds to deny relief of reinstatement and back wages to the workmen. See the following observations:-

"25. The appellants have not been able to satisfy us that the several reasons given by the Tribunal for not directing reinstatement of the appellants-workmen are incorrect as a fact or that they are irrelevant or impermissible in law. That the respondent-Corporation is groaning under the weight of surplus and excessive man-power is not denied as a fact; indeed, it is an undeniable fact. The Industrial Tribunal is entitled to take note of the said fact and to mould the relief to suit the justice of the case ....."

29. On the alleged charge of adopting discriminatory attitude and unfair labour practice, submission made on behalf of the employer is that the employer, in the conditions and circumstances obtained in the industry, could justifiably treat differently in the matter of giving benefit of settlement, erstwhile employees of the Ahmedabad Municipal Corporation whose services were taken over and the subsequently employed as Badli or substitute workers. Reliance is rightly placed on the observations of the Supreme Court contained in para 31 in the case of Process Technicians and Analysts Vs. Union of India reported in AIR 1977 SC 1288.

30. Considering the claim of regularisation or reinstatement and backwages to the workmen, the financial condition of the Industry and its requirement for the jobs or posts cannot be overlooked. As a matter of fact, these are very relevant circumstances and might justify denial in a given case. In the instant case, admittedly Abad Dairy is now a sick unit. Due to competitive market in Gujarat its business has gone down so much that it is under tremendous financial strain. There are few job opportunities available with it. As has been pointed out in the reply affidavit the sale of milk in the year 1994-95 was 3 lacs litres per day which at the time of filing reply in the petition in the month of February 1995 had gone down to hardly 45000 litres per day. The statement on affidavit reads:

> "With the sale of milk taking nose-dive as aforesaid, it was no longer possible for the respondent Dairy to provide work to even its permanent workmen. Since large number of permanent workmen were surplus in the Dairy there is a burden of idle wages. The employer had to introduce voluntary retirement schemes resulting in 671 workmen availing the benefit of retirement. The adverse market conditions has financially crippled the dairy. It showed accumulated losses at the end of financial year 31st March, 1994 to the tune of Rs.27,75,03,767/-. As a result it was declared sick unit by the Board of Industrial and Financial Construction by order passed on 26.10.1994."

Without going into the legal question whether the provisions of Section 22(3) of the Sick Industrial Undertakings Act would bare any such proceedings at the instance of the workmen for regularisation and back wages, we are clearly of the opinion that it would be

highly unjust to grant workmen the relief of regularisation and back wages as prayed by them which the sick unit is unable to provide.

31. In rejecting the claim of the workmen, we are supported by the following observations of the Supreme Court in the case of Surendra Kumar Verma Vs. The Central Government Indsutrail Tribunal-cum-Labour Court, New Delhi and Another reported in 1981 SC 422. The relevant portion reads as under:

> "6. ..... But there may be exceptional circumstances which make it impossible or wholly inequitable to grant reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is vestige of discretion left in the Court to make appropriate consequential orders. The Court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The Court may deny the relief of award of full back wages where that would place an impossible burden on the employer. ..... "

32. For all the above reasons, our conclusion is that the Learned Single Judges have erred in granting relief of regularisation and monetary benefits with retrospective effect to the workmen. In view of the detailed discussions above, the Letters Patent Appeals preferred by the employer succeed and they are all allowed. The impugned orders of the Learned Single Judge (M.R.Calla, J) dated 23.4.96, 1.5.96, 21.6.96, 24.6.96, 3.8.96, 5.8.96 & 22.1.1998 of Justice R.Balia, in all the cases are set aside. Rule made absolute in all the above petitions filed by the employer. In the circumstances of the case, the parties shall bear their own costs.

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